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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. [redacted] 47

FOX FILM CORPORATION,

Petitioner,

v.

A. B. MULLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

PETITION.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner respectfully shows:

A. Summary Statement of the Matter Involved.

A prior petition for a writ of certiorari to the Supreme Court of Minnesota in this case was first granted by this Court and later dismissed as improvidently granted because no final judgment had been entered (R. 91-93; 293 U. S. 550; 79 L. Ed. 533). Thereafter, on April 11, 1935, a final judgment was entered in the case (R. 95-97, 102-103, 106-107).

This is an action brought by the petitioner, Fox Film Corporation, the owner and distributor of motion picture films, against the respondent, A. B. Muller, a motion picture exhibitor, upon two contracts made by the parties on or about September 6, 1929 (R. 2-9, 64). Each of these contracts provided, among other things, that the petitioner should grant to the respondent a license under copyright to exhibit and should deliver designated films and that the respondent should exhibit the films and pay the petitioner stipulated sums (R. 65, 66, 3-4, 7-8, 22). The petitioner, in accordance with the terms of the contracts, made such films available for the respondent's use and notified the respondent in writing that such films were available and tendered them, and performed all of the terms and conditions of the contracts on its part, but the respondent refused to accept or exhibit the films or pay any part of the stipulated sums (R. 65-67, 6, 8, 22). If the petitioner is entitled to recover, its damages are $1,838.42 (R. 56).

Following a trial before a Judge without a jury the District Court of the Fourth Judicial District, County of Hennepin, State of Minnesota, rendered a decision dismissing the action on the sole ground that the contracts sued upon were "null and void and illegal, and in violation of the Sherman Anti-Trust Act" (R. 50, 56). The petitioner made a motion in the Minnesota District Court for judgment notwithstanding the decision or for a new trial, and the motion was denied (R. 70-72). On appeal the Supreme Court of Minnesota affirmed the order denying the motion (R. 74, 89) and denied an application by the petitioner for reargument (R. 88, 84-87). Thereupon the first petition for certiorari was filed in this Court. After such petition had been dismissed as improvidently granted the District Court entered a judgment and decree adjudging that each of the contracts sued upon is "null and void and illegal, and in violation of the Sherman Anti-Trust Act," and dismissing the action with costs to the respondent, and, on appeal, the Supreme Court of Minnesota entered a final judgment affirming the judgment of the District Court (R. 95-97, 102-103, 106-107).

The District Court found that the printed portions of each of the contracts were substantially the same as the form known as the "Standard Exhibition Contract" involved in the case of *United States* v. *Paramount Famous Lasky Corporation et al.* (34 F. [2d] 984, aff'd 282 U. S. 30), that the Standard Exhibition Contract contains in paragraph Eighteenth a compulsory arbitration clause providing for penalties to be imposed upon an exhibitor if he refuses to arbitrate or to abide by any arbitration award and for joint summary action by the distributors to enforce the clause against the exhibitors, and that the paragraph Eighteenth contained in each of the contracts sued upon is the same as the paragraph Eighteenth in the contract held by the decisions in the *Paramount* case to be illegal and unenforceable. (R. 68, 55).

In the *Paramount* case the United States sued under Section 4 of the Sherman Anti-Trust Act (Act of Congress, July 2, 1890, c. 647, 26 Stat. 209) to enjoin the petitioner and several other distributors from further engaging in a conspiracy in restraint of trade in violation of Section 1 of that Act* (34 F. [2d] 984). The gist of the conspiracy charged in the petition of the United States was the action of the defendants in carrying on their interstate trade in motion picture films in accordance with an understanding and agreement between them the purpose and object of which was to coerce every exhibitor of motion picture films in the United States (1) to submit to arbitration any dispute with any of the distributors arising under any contract licensing the

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* Section 1 provides as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

exhibition of motion pictures, (2) to waive the right to have any such dispute determined by any court and (3) to comply with any award rendered against him in any such arbitration. (See extract from petition set forth in Appendix A.) On January 21, 1930, the United States District Court for the Southern District of New York made a decree in the *Paramount* case. (A copy of the decree is set forth in Appendix B.) Section I of this decree declared that the agreement of the defendants to adopt and to use exclusively the Standard Exhibition Contract in contracting with exhibitors, their adoption of certain "Rules of Arbitration," and the means by which they collectively coerced adoption of and compliance with such contract and such rules constituted a conspiracy in restraint of trade in violation of the Sherman Anti-Trust Act. Section II of the decree contained provisions enjoining the defendants, among other things, from further engaging in or carrying out such conspiracy and from entering into any contract embodying the provisions of paragraph Eighteenth of the Standard Exhibition Contract and/or the Rules of Arbitration. This section of the decree also contained provisions enjoining the defendants

> "4. From enforcing, directly or indirectly, any of the provisions of paragraph 'Eighteenth,' entitled 'Arbitration,' of said 'Standard Exhibition Contract' dated May 1, 1928, against any exhibitor of motion pictures in the United States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph."

and

> "8. From suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to comply with any provision of said paragraph 'Eighteenth' of said 'Standard Exhibit Contract' of May 1, 1928, or of said 'Rules of Arbitration' dated May 1, 1926, unless there be legal cause for suspending or refusing to promptly resume such service arising independently of any of the provisions of said paragraph 'Eighteenth' of said 'Standard Exhibition Contract' or of said Rule IV of said 'Rules of Arbitration.'"

Section III of the decree contained the following:

> "Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree."

The decree was affirmed without modification by this Court (282 U. S. 30).

Since the decision of this Court in the *Paramount* case, all machinery, methods and rules for arbitration under the Standard Exhibition Contract have been abolished, and the petitioner claimed no right in this action under paragraph Eighteenth (R. 68-69).

B. Specification of Errors.

The Minnesota courts erred:

1. In sustaining the respondent's defense of illegality;

2. In holding that the contracts sued upon are rendered unenforceable in this action by the Sherman Anti-Trust Act;

3. In holding that the contracts sued upon are illegal and void in their entirety; and

4. In failing to correctly apply the decision in the *Paramount* case (Appendix B; 34 F. [2d] 984, aff'd 282 U. S. 30).

C. Reasons Relied on for the Allowance of the Writ.

1. The Minnesota courts decided a federal question of substance in a way not in accord with applicable decisions of this Court.

(a) The Minnesota courts held that the Standard Exhibition Contract is rendered illegal, void and unenforceable *in its entirety* by the Sherman Anti-Trust Act (R. 56, 89, 95-96, 106-107, 77-83). In the *Paramount* case, however, this Court affirmed a decree which, in effect, held only the arbitra-

tion provisions of such contract illegal, enjoined the distributors, including the petitioner, from refusing to perform the remainder of such contract because of non-performance by the exhibitor of such provisions, and saved to the distributors their right to continue to perform and enforce by any lawful means any obligation of such contract the performance or enforcement of which is consistent with the decree, and thus, in effect, held such contract, except the arbitration provisions, legal, valid and enforceable (Appendix B; 282 U. S. 30). (See pp. 3-5, *supra*, and pp. 10-12, *infra*.)

(b) The Minnesota courts denied the right of a distributor to compel performance of the Standard Exhibition Contract other than the illegal provisions on the part of an exhibitor, although the decree affirmed by this Court in the *Paramount* case enjoined each distributor from refusing such performance on his part. (See pp. 10-12, *infra*).

(c) The Minnesota courts sustained a defense founded on the Sherman Anti-Trust Act, although this Court has denied the sufficiency of such a defense in analogous cases. (See pp. 13-15, *infra*).

2. The question whether the provisions of the Standard Exhibition Contract other than those condemned in the *Paramount* case are rendered unenforceable by the decision in such case or by the Sherman Anti-Trust Act is a question of great general importance which has been the subject of conflicting decisions in several of the highest state courts and federal courts and should be determined by this Court. At the time of the decree in the *Paramount* case many thousands of Standard Exhibition Contracts were outstanding (R. 57; 34 F. [2d], pp. 984-986). Following that decision numerous actions similar to the present one were commenced by distributors upon Standard Exhibition Contracts in many different jurisdictions (R. 57-58). In very rapid succession a number of conflicting decisions have come down in different state and federal courts (R. 58). The federal question

involved in the present case has been decided contrary to the decision of the Minnesota court in the following cases:

Paramount Famous Lasky Corporation v. *National Theatre Corporation,* 49 F. (2d) 64 (C. C. A., 4th Circ., Apr. 13, 1931);

Fox Film Corporation v. *Ogden Theatre Co.,* 82 Utah 279, 17 P. (2d) 294 (Dec. 29, 1932);

Fox Film Corporation v. *Buchanan,* 17 La. App. 285, 136 So. 197 (July 14, 1931);

Columbia Pictures Corporation v. *Bi-Metallic Inv. Co.,* 42 F. (2d) 873 (D. C., D. Colo., Aug. 8, 1930); and

Metro-Goldwyn-Mayer Distributing Corporation v. *Cocke,* 56 S. W. 489 (Tex. Civ. App., Jan. 18, 1933);

and in accord with the decision of the Minnesota court in the following cases:

Fox Film Corporation v. *Tri-State Theatres,* 51 Idaho 439, 6 P. (2d) 135 (Dec. 18, 1931);

United Artists Corporation v. *Odeon Building, Inc.,* 212 Wis. 150, 248 N. W. 784 (June 6, 1933);

United Artists Corporation v. *Piller,* 62 N. D. 289, 244 N. W. 20 (June 30, 1932);

Vitagraph v. *Theatre Realty Co.,* 50 F. (2d) 907 (D. C., E. D. Pa., Apr. 28, 1931);

Universal Film Exchanges, Inc. v. *West,* 163 Miss. 272, 141 So. 293 (Apr. 26, 1932); and

Fox Film Corporation v. *C. & M. Amusement Co.,* 58 F. (2d) 337 (D. C., S. D. Ohio, E. D., Mar. 28, 1932).

We respectfully submit that this conflict in the application of the Sherman Anti-Trust Act should be settled by the authoritative decision of this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court directed to the Supreme Court of the State of Minnesota commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and all proceedings in the case of Fox Film Corporation, Appellant, v. A. B. Muller, Respondent, Docket Nos. 29872 and 30485, and that the judgment herein of the Supreme Court of the State of Minnesota be reversed by this Court, and that your petitioner may have further relief as to this Court may seem proper.

Dated: May 8, 1935.

FOX FILM CORPORATION,
JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

The Opinions of the Courts Below.

The opinion of the Supreme Court of Minnesota filed April 9, 1935, affirming the judgment of the District Court (R. 104) is not yet reported in either the official or unofficial reports. Its opinion filed June 29, 1934, affirming the order of the District Court denying the petitioner's motion for judgment notwithstanding the decision or for a new trial (R. 77-83) is reported in 255 N. W. 845, but is not yet reported in the official reports. The memoranda written by the District Court in connection with its decision (R. 57-63) and its order denying the petitioner's motion for judgment notwithstanding the decision or for a new trial (R. 73) are unreported.

Jurisdiction.

The jurisdiction of this Court to review the final judgment entered by the Supreme Court of Minnesota in this case on April 11, 1935 (R. 106-107) is invoked under Section 237 (b) of the Judicial Code as amended (Act of Congress, Feb. 13, 1925, c. 229, § 1, 43 Stat. 937), which gives this Court jurisdiction to review, by certiorari, any cause wherein a final judgment has been rendered by the highest court of a state "where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of * * * the United States." The respondent claimed a right, privilege or immunity under the Sherman Anti-Trust Act (Act of Congress, July 2, 1890, c. 647, 26 Stat. 209), by pleading in its answer (R. 9-18) a defense to the effect that the contracts sued upon are rendered unenforceable in this action by such Act. *Cf. Nutt v. Knut*, 200 U. S. 12; *Bement National Harrow Co.*, 186

U. S. 70.* The sufficiency of this defense was the only issue litigated and was the sole ground of the decision sought to be reviewed (R. 21-24, 56, 77-83, 95-96, 104, 106-107). The fact that the decision was expressly rested upon a determination of the federal question gives this Court jurisdiction regardless of whether non-federal questions were also raised. *Virginia* v. *Imperial Coal Co.*, 293 U. S. 15, 16-17.

Statement of the Case and Specification of Errors.

The statement of the case and the specification of errors are contained in the petition.

ARGUMENT.

FIRST: The decision of the Supreme Court of Minnesota conflicts with the decision of this Court in the *Paramount* case (282 U. S. 30) upon the effect of the Sherman Anti-Trust Act on the validity of the Standard Exhibition Contract and the rights of the petitioner under such contract.

The Supreme Court of Minnesota affirmed a judgment based upon a holding that the Standard Exhibition Contracts sued upon "are null and void and illegal, and in violation of the Sherman Anti-Trust Act" (R. 95-96, 106-107). In its opinion it described the respondent's position as follows:

> "The defendant relies upon the total illegality of the leasing contracts as in restraint of trade in viola-

* Section 709 of the Revised Statutes, under which these cases came up, gave this Court power to review the final judgment of the highest court of a state "where any title, right, privilege or immunity" was claimed under a statute of the United States and the decision was *against* such title, right, privilege or immunity. See *Nutt* v. *Knut*, p. 19. The power to review given by the present Section 237 (b) of the Judicial Code, however, "may be exercised as well where the Federal claim is sustained as where it is denied."

> tion of the Federal anti-trust act as determined in the United States v. Paramount, 34 F. (2d) 984, affirmed in 282 U. S. 30, 51 S. Ct. 42, 75 L. ed. 145" (R. 78).

It construed the decision in the *Paramount* case as holding that the Standard Exhibition Contract is illegal in its entirety (R. 80-81).

The decision in the *Paramount* case did not hold the Standard Exhibition Contract illegal in its entirety, but on the contrary held that such contract, except for the arbitration provisions, is legal, valid and enforceable.

The conspiracy condemned in the *Paramount* case was a conspiracy among the distributors to impose compulsory arbitration upon the exhibitors and the arbitration provisions contained in paragraph Eighteenth of the Standard Exhibition Contract constituted one of the means by which this conspiracy was pursued (Appendices A and B; 34 F. [2d], pp. 984, 986-988; 282 U. S., pp. 37-41). Accordingly, the decree in the *Paramount* case, in enjoining the distributors from pursuing the conspiracy, expressly enjoined them from entering into any agreement embodying the provisions of paragraph Eighteenth or enforcing any of such provisions "against any exhibitor of motion pictures in the United States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph" (Appendix B, Sec. II [3], [4]). Since the court must necessarily have realized that all or practically all of the many thousands of existing contracts were in the standard form (see 34 F. [2d], p. 987; R. 57), the fact that it enjoined the distributors from enforcing paragraph Eighteenth of the "existing" contracts shows that it did not hold the other portions of the Standard Exhibition Contract illegal, but on the contrary contemplated that they would be performed just as if the illegal paragraph had been deleted. That this is the correct construction of the decree is shown also by the provision enjoining the distributors "from suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to comply with any provision of said paragraph

'Eighteenth'" (Appendix B, Sec. II [8]) and the provision to the effect that nothing in the decree should be construed as prohibiting any defendant "from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of this decree" (Appendix B, Sec. III). Had the court intended these provisions of its decree to apply only to the few contracts, if any, which might be in existence other than the many thousands of Standard Exhibition Contracts, it would certainly have said so.

By enjoining the distributors "from suspending and from refusing to promptly resume service to any exhibitor" because of non-compliance with paragraph Eighteenth the court not only indicated that it contemplated the continued performance of the portions of the Standard Exhibition Contracts other than paragraph Eighteenth, but also, in effect, imposed upon each distributor, including the petitioner, an affirmative duty to continue performance of such portions of the Standard Exhibition Contracts.

In affirming the decree in the *Paramount* case without modification this Court in effect held that except for paragraph Eighteenth the Standard Exhibition Contract is legal, and is enforceable *against the petitioner*. Thus the decision of the Supreme Court of Minnesota that the Standard Exhibition Contracts sued upon are illegal in their entirety, and are not enforceable *against the respondent*, conflicts with the decision of this Court both upon the effect of the Sherman Anti-Trust Act on the validity of the Standard Exhibition Contract and the rights of the petitioner under such contract. In effect it holds that, although as was held in the *Paramount* case the petitioner has duties under the contract to the respondent, the respondent has no correlative duties under the contract to the petitioner. A situation more incompatible with a uniform application of the Sherman Anti-Trust Act can hardly be imagined, and we respectfully submit that the jurisdiction of this Court should be exercised to correct it.

SECOND: The decision of the Supreme Court of Minnesota conflicts with the applicable decisions of this Court on the sufficiency in an action upon contract of a defense founded on the Sherman Anti-Trust Act.

The decision of the Supreme Court of Minnesota rests upon the assumption that the whole contract is "tainted by the illegal arbitration clause" (R. 82). Apart from the above-mentioned decision in the *Paramount* case, it is well settled that a contract is not necessarily "tainted" because it may contain an illegal provision in restraint of trade or an illegal arbitration provision. See *Paramount Famous Lasky Corporation* v. *National Theatre Corporation,* 49 F. (2d) 64, 66 (C. C. A., 4th Circ.), and *Fox Film Corporation* v. *Ogden Theatre Co.,* 82 Utah 279, 17 P. (2d) 294, 297 and authorities there cited. See also *Oregon Steam Navigation Co.* v. *Winsor,* 20 Wall. 64, 70. The arbitration provisions in the Standard Exhibition Contract have no necessary or inseverable relation to the remainder of the contract. The contract was adopted in the interests of both the distributors and the exhibitors for the purpose of carrying on their regular business in connection with the furnishing and use of motion picture films (34 F. [2d], pp. 985-986). Arbitration was merely one of the means of enforcing the contract and there is no reason to suppose that it was a major consideration of the contract or that the deletion of the provisions for arbitration and the enforcement of the remainder of the contract will work injustice to the exhibitors. Therefore, if the whole contract is "tainted," it must be because its enforcement even without the illegal arbitration clause will contravene the Sherman Anti-Trust Act or public policy.

The combination which was held to violate the Sherman Anti-Trust Act in the *Paramount* case was a combination of distributors for the purpose of imposing compulsory arbitration upon the exhibitors. The only provisions of the Standard Exhibition Contract which contributed to the accomplishment of this purpose are the arbitration provisions. The Standard Exhibition Contract is not the arrangement by which the combination came into existence, but is

merely collateral to such arrangement (Appendix B, Sec. I). There is no necessary connection between the provisions sought to be enforced in this action and such arrangement, and the enforcement of such provisions will have no tendency to accomplish the purpose of the combination. The decisions of this Court show that under such circumstances the Sherman Anti-Trust Act affords no defense to an action upon contract. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 165; *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248.

In *Connolly* v. *Union Sewer Pipe Co., supra*, this Court sustained a judgment for the price of sewer pipe sold and delivered, notwithstanding the fact that the plaintiff was an illegal combination organized for the purpose of preventing competition in the manufacture and sale of sewer pipe and limiting the production of and increasing and controlling the wholesale and retail price of the product, and the fact that the combination was acting for such purpose in making the sales upon which the action was founded. In the majority opinion this Court said, at page 551:

> "The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal yet the sale to the defendants was valid."

In *D. R. Wilder Manufacturing Co.* v. *Corn Products Refining Co., supra,* this Court affirmed a judgment for the price of glucose sold and delivered, notwithstanding the fact that the plaintiff was a combination which was illegally organized with the object of monopolizing all dealings in the product, and had unreasonably advanced the price of the product to the injury of the public and sought to and did drive competitors out of the field by means of offering to customers a percentage of profits upon the condition of their dealing exclusively with it.

In *A. B. Small Co.* v. *Lamborn & Co., supra,* this Court affirmed a judgment for the difference between the contract price of sugar which the defendant had contracted for and refused to accept and the amount obtained by the plaintiff upon resale, notwithstanding the facts that the plaintiff and others had entered into an illegal combination to manipulate trade in refined sugar with a view to increasing the price, that the contracts sued upon were made during the life of the combination and that the plaintiff conformed the terms of sale to the standards sanctioned by the combination.

The Supreme Court of Minnesota relied upon *Continental Wall Paper Co.* v. *Voight & Sons Co.,* 212 U. S. 227 (R. 83). In that case this Court affirmed a judgment which denied recovery by the representative of an illegal combination for the price of wall paper sold and delivered to a dealer. The case involved certain facts which distinguished it from both the *Connolly* case and the present one. There, as in the *Connolly* case, the purpose of the combination was to monopolize and prevent competition in the manufacture and sale of, limit the production of and increase the wholesale and retail price of a product. The agreement sued upon, however, obligated the dealer to buy from no one but members of the combination and to refrain from selling to the public at less than scheduled prices under penalty of being unable to buy wall paper and being driven out of business. It was admitted on demurrer that "the immediate, intended and direct effect of the said combination and agreements was the stifling of competition between the manufacturers and

vendors of wall paper, and between the jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one-half more than the price which it would be had the same been left to free and unrestrained competition," and that the prices sued for were "the prices fixed and determined in pursuance of and by the combination" and were "unreasonable, unjust and excessive and at least one-half more than they would otherwise have been" and "above the fair market price of such merchandise by more than the amount sought to be recovered" (pp. 251, 253). In the majority opinion of this Court it was concluded that the plaintiff, representing an illegal combination, could not have a judgment for the amount of the account sued on "because, for the reasons we have stated, such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination" (pp. 266-267). The principal reasons for this conclusion were thus stated in the opinion:

> "If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination.
>
> * * * * * * *
>
> "Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the States and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends" (pp. 261-262).

In the *Wilder* case, *supra*, this Court approved the ruling in the *Connolly* case (p. 172) and, in distinguishing the ruling in the *Continental Wall Paper* case, said that that case

> "* * * was rested exclusively upon elements of illegality inhering in the particular contract of sale in that case which elements of illegality may be thus summarized: (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to

allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale" (p. 177).

We submit that the *Continental Wall Paper* case held merely that enforcement of a contract will be denied where it would aid an illegal combination "to accomplish forbidden ends." This would certainly have been the result of permitting the combination to recover from the dealer the admittedly "unreasonable, unjust and excessive" price, the exacting of which was one of the principal purposes of the combination. The enforcement of the contract involved in the present case, however, obviously will not accomplish or have any tendency to promote the "forbidden ends" of the combination which was condemned in the *Paramount* case.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari to review and by reviewing and reversing the decision of the Supreme Court of Minnesota.

JAMES D. SHEARER,
PERCY HEILIGER,
Counsel for Petitioner.

APPENDIX A.

Extract from Petition in *United States* v. *Paramount.*

VIII.

The Conspiracy.

The defendants, each well knowing all the matters and things hereinbefore alleged, unlawfully have engaged in a conspiracy in restraint of said interstate trade and commerce in motion picture films so carried on as aforesaid by said defendant distributors, by said members of said defendant Film Boards of Trade, and by all said exhibitors of motion pictures in the United States, that is to say, in a conspiracy now here described in restraint of, and which throughout the period of time herein mentioned in fact unlawfully has restrained, and which now is restraining said interstate trade and commerce, to wit:

Since on or about July, 1922, said defendant distributors have carried on their said interstate trade and commerce in motion picture films in accordance with and pursuant to an understanding and agreement between said defendant distributors:

a. To coerce and to require every exhibitor of motion picture films in the United States to submit to arbitration any question or dispute with any member of any defendant Film Board of Trade arising under any contract licensing the exhibition of a motion picture or of motion pictures;

b. To coerce and to require every exhibitor of motion pictures in the United States to surrender and to waive the right to have any question or dispute with any member of any defendant Film Board of Trade arising under any contract licensing the exhibition of a motion picture or of motion pictures, settled and determined by any court having jurisdiction of such question or dispute;

c. To coerce and to require every exhibitor of motion pictures in the United States to comply with any award rendered against him in any arbitration proceeding as aforesaid, without recourse or appeal to any court having jurisdiction of said question or dispute.

Since in or about July, 1922, said defendant distributors have carried on their said interstate trade and commerce in motion picture films in accordance with and pursuant to an understanding and agreement between said defendant distributors to carry out and to accomplish the aforesaid purposes and objects:

a. By refusing to enter into any contract with any exhibitor of motion pictures in the United States to license the exhibition of any motion picture and to transport, supply and deliver any motion picture film in the course of the aforesaid interstate trade and commerce, except on the terms and under the contions (hereinafter specified) agreed upon by said defendant distributors;

b. By refusing to transport, supply and deliver in the course of the aforesaid interstate trade and commerce any motion picture film to any exhibitor of motion pictures in the United States having a contract therefor, in the event of the failure or refusal of said exhibitor fully to comply with any term or condition (hereinafter specified) agreed upon by said defendant distributors.

All in the manner and by the means more particularly set forth hereinafter.

APPENDIX B.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Petitioner,

against

PARAMOUNT FAMOUS LASKY CORPORATION, *et al.*,
Defendants.

E. 45-100.

DECREE

This cause having come on to be heard, and the Court having considered the evidence and the arguments of counsel, and having filed its Opinion herein on the 15th day of October, 1929, and upon motion of the petitioner by Charles H. Tuttle, United States Attorney for the Southern District of New York, and John Lord O'Brian, the Assistant to the Attorney General, and C. Stanley Thompson, Special Assistant to the Attorney General, of Counsel, for relief in accordance with the prayer of the petition, and the defendants having appeared by their attorneys, Cadwalader, Wickersham & Taft, and Edwin P. Grosvenor, Arthur L. Fisk, Jr., and Gabriel L. Hess, of Counsel; now, therefore, it is

ORDERED, ADJUDGED AND DECREED as follows:

I

That the agreement of the defendants to adopt and to use exclusively in contracting with exhibitors of motion pictures throughout the United States the "Standard Exhibition Contract" dated May 1, 1928, which is attached to the petition herein as Exhibit "C" thereto, the adoption by the defendants of the "Rules of Arbitration" dated May 1, 1928, which is

attached to the petition herein as Exhibit "G" thereto, and all the activities and agreements of said defendants by means of which they have collectively coerced adoption of and compliance with said "Standard Exhibition Contract" and said "Rules of Arbitration," constitute a conspiracy in restraint of interstate trade and commerce in violation of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," known as the Sherman Anti-Trust Act.

II

That the defendants, their officers, agents, servants and employees, and all persons acting under, through or on behalf of them, or any of them, hereby are perpetually enjoined, restrained and prohibited, individually and collectively: * * *

1. From further engaging in or carrying out said conspiracy or any other conspiracy similar to or having the same purpose and/or effect as said conspiracy.

2. From doing any act or thing whatsoever for the purpose or with the effect of carrying out hereafter the purposes of said conspiracy, or any of them.

3. From entering into any agreement embodying the provisions of paragraph "Eighteenth" of said "Standard Exhibition Contract" dated May 1, 1928, and/or the provisions of said "Rules of Arbitration" dated May 1, 1928.

4. From enforcing, directly or indirectly, any of the provisions of paragraph "Eighteenth," entitled "Arbitration," of said "Standard Exhibition Contract" dated May 1, 1928, against any exhibitor of motion pictures in the United States having an existing contract licensing the exhibition of a motion picture or of motion pictures which contains said paragraph.

5. From enforcing, directly or indirectly, any of the provisions of Rule IV, entitled "Enforcement of Decisions of Board of Arbitration," of said "Rules of Arbitration" dated May 1, 1928, against any exhibitor of motion pictures in

the United States, on account of any claim, controversy or dispute arising under or on account of any existing contract licensing the exhibition of a motion picture or of motion pictures.

6. From demanding security from any exhibitor of motion pictures in the United States because of any failure or refusal to comply with any provisions of said paragraph "Eighteenth," entitled "Arbitration," of said "Standard Exhibition Contract" of May 1, 1928, contained in any existing contract licensing the exhibition of a motion picture or of motion pictures.

7. From retaining any sum or sums heretofore received in accordance with the provisions of said paragraph "Eighteenth" of said "Standard Exhibition Contract" dated May 1, 1928, and/or said Rule IV entitled "Enforcement of Decisions of Board of Arbitration" of said "Rules of Arbitration" dated May 1, 1928, from any exhibitor of motion pictures in the United States, as security for the performance of any contract licensing the exhibition of a motion picture or of motion pictures.

8. From suspending and from refusing to promptly resume service to any exhibitor in the United States because of any failure or refusal to comply with any provision of said paragraph "Eighteenth" of said "Standard Exhibition Contract" of May 1, 1928, or of said "Rules of Arbitration" dated May 1, 1928, unless there be legal cause for suspending or refusing to promptly resume such service arising independently of any of the provisions of said paragraph "Eighteenth" of said "Standard Exhibition Contract" or of said Rule IV of said "Rules of Arbitration."

9. From continuing to act upon and from entering into any understanding, arrangement, combination, conspiracy or agreement either to refrain from entering into any contract for licensing the exhibition of a motion picture or motion pictures, or to require the deposit of security as a condition for entering into or continuing to perform any such contract which has not been breached by the exhibitor, or to fix

in advance any terms or conditions upon which any defendant or any member of any defendant Film Board of Trade shall enter into any such contract,—if the purpose or effect of such understanding, arrangement, combination, conspiracy or agreement is either:

(a) To coerce or to require any exhibitor of motion pictures in the United States to submit to arbitration any claim, controversy or dispute with any defendant or with any member of any defendant Film Board of Trade, arising under any contract licensing the exhibition of a motion picture or of motion pictures; or

(b) To coerce or to require any exhibitor of motion pictures in the United States to surrender and to waive the right to have any claim, controversy or dispute with any defendant or with any member of any defendant Film Board of Trade, arising under any contract licensing the exhibition of a motion picture or of motion pictures, settled and determined by any Court having jurisdiction of such claim, controversy or dispute; or

(c) To coerce or to require any exhibitor of motion pictures in the United States to comply with any award rendered against him in any arbitration proceeding with any defendant or with any member of any defendant Film Board of Trade, arising under or on account of any contract licensing the exhibition of a motion picture or of motion pictures, without recourse or appeal to any Court having jurisdiction of the claim, controversy or dispute occasioning said award.

III

Nothing contained in this decree shall be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from performing and/or continuing to perform, or enforcing and/or continuing to enforce, by any lawful means any contractual obligation the performance or enforcement of which is consistent with the provisions of

this decree. Nor shall anything contained in this decree be construed as prohibiting any defendant or any member of any defendant Film Board of Trade from selecting his or its own trade, from disposing of his or its own products, or from making any contracts with or without provisions relating to arbitration—all upon such terms as he or it may choose—provided such acts are done individually and without combining, conspiring or agreeing with any other defendant or any member of any Film Board of Trade.

Nothing contained in this decree shall be construed in derogation of the right of the defendants, or any of them, individually or jointly, to negotiate and to agree with any exhibitors of motion pictures on a standard form of contract to be used in licensing the exhibition of motion pictures or on any standard provision or provisions to be included in such license contracts, including reasonable provisions for the arbitration of disputes arising thereunder, if done voluntarily and without coercion, and if applied only to the parties to the negotiations and agreement.

Nothing contained in this decree shall be construed as limiting or modifying, or shall in anywise limit, restrict, modify or qualify, the Opinion filed in the companion case hereto, *"United States* v. *First National Pictures, Inc., et al."* (In Equity No. 45-99), and the decree of the Court entered therein dismissing the petition of the Government on the merits as against the defendants herein; in which case it was held that the Rules and Regulations for the establishment and operations of a Credit Committee, annexed to said petition as "Exhibit A," as agreed to, adopted and enforced by these defendants, was not and is not in violation of the Sherman Anti-Trust Act, and that these defendants have not engaged in a combination or conspiracy to restrain trade or commerce in violation of said Act on account of their adoption and enforcement of and operation under said Credit Rules and Regulations.

IV

Jurisdiction of this cause is hereby retained for the purpose of enforcing this decree and making such other and further orders and decrees as may become necessary, and for the purpose of enabling any party hereto to apply to the Court for such further orders and directions as may be necessary or proper in relation to the carrying out of the provisions of this decree, or to apply to the Court for modification hereof if it be hereafter shown to the satisfaction of the Court that by reason of changed conditions or changes in the statute law of the United States the provisions hereof have become inadequate or inappropriate, or have become unduly oppressive to the defendants, and are no longer necessary to secure conditions in harmony with the law.

Dated: New York, January 21st, 1930.

(Sgd.) T. D. THACHER,
United States District Judge.